(2)

Supreme Court, U.S.
FILED
JUL - 1 2004
OFFICE OF THE CLERK

No. 03-1488

In The
Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

BRIEF IN OPPOSITION

JONATHAN B. COLE
Counsel of Record
KAREN K. COFFIN
SUSAN S. BAKER
NEMECEK & COLE
15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403
(818) 788-9500
Attorneys for Respondent Johnnie L. Cochran, Jr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a permanent injunction, directed to parties who have engaged in defamatory and extortionist picketing, violates the First Amendment by imposing a broad "place" restriction on future speech related activities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
CERTIORARI SHOULD BE DENIED BECAUSE FEDERAL AND STATE COURTS UNIFORMLY HOLD THAT TORTIOUS PICKETING AND RELATED SPEECH SUCH AS THAT HERE AT ISSUE MAY BE ENJOINED WITHOUT CREATING AN UNCONSTITUTIONAL "PRIOR RESTRAINT"	4
A. There Is No "Split" Between Circuits And/Or States For This Court To "Resolve"	5
1. Existing Case Law Is Consistent With The Principles Of Law Espoused By This Court In *Pittsburgh Press*	6
2. *Pittsburgh Press* And The Cases That Follow It Are Consistent With Other Cases Decided By This And Other Courts	10
B. The Particular Injunction Here At Issue Comports With The Rules Created By The Case Law	11
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES	
Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc., 352 N.W.2d 1 (Minn. 1984)	7
Cantwell v. Connecticut, 310 U.S. 296 (1940)	8
Carter v. Knapp Motor Co., 11 So. 2d 383 (Ala. 1943)	8, 9
Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (1980)	4
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	8
Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (2000)	3
Guion v. Terra Mktg. of Nevada, Inc., 523 P.2d 847 (Nev. 1974)	7, 8
Hill v. Colorado, 530 U.S. 703 (2000)	3
Lothschuetz v. Carpenter, 898 F.2d 1200 (9th Cir. 1990)	9
Menard v. Houle, 11 N.E.2d 436 (Mass. 1937)	8, 9
Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees, 79 N.E.2d 46 (Ill. 1948)	11
Near v. Minnesota, 683 U.S. 697 (1931)	10
New York Times Co. v. United States, 403 U.S. 713 (1971)	7, 10
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	7, 10

TABLE OF AUTHORITIES – Continued

Page

O'Brien v. University Community Tenants Union, Inc., 327 N.E.2d 753 (Ohio 1975) 8

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 375 (1973) 6, 7, 8, 10

Retail Credit Company v. Russell, 234 Ga. 765 (1975) 7, 10

Schmoldt v. Oakley, 390 P.2d 882 (Okla. 1964) 11

Zhao v. Wong, 48 Cal.App.4th 1114 (1996) 3

RULES

Rules of the Supreme Court of the United States, Rule 10 4

INTRODUCTION

For the sake of brevity, Respondents will not mince words. Petitioners ULYSSES TORY and RUTH CRAFT ("Petitioners" or "TORY") are wrong on the facts, wrong on the law, and wrong as to the paramount public policies. In contrast, the California Court of Appeal, Second Appellate District, has it exactly right. The Court of Appeal meticulously and correctly applied the existing law to the facts which the trial court, after a **full trial on the merits**, determined to be undisputed.

TORY's petition for writ of certiorari fails to demonstrate why this Court should entertain his cause. The underlying appellate court opinion is unpublished and has no precedential value, creating no need for this Court to secure uniformity of decision. In addition, the Court of Appeal properly applied the law to the adjudicated facts.

Petitioners assert that review is appropriate to resolve what they contend is a conflict among various courts regarding the propriety of injunctions in defamation cases. However, just as they did in the Court of Appeal, Appellants ignore one crucial fact in their Petition. TORY's speech was enjoined (and the injunction affirmed) ***not*** because of its content, ***but because of its purpose***. As recognized by both the Trial Court and the Court of Appeal, TORY engaged in protests and made defamatory statements about COCHRAN for the express purpose of coercing payment of money by COCHRAN to TORY in tribute for or premium for desisting from unlawful picketing. In other words, TORY was abusing his free speech right by making knowingly false statements for personal financial gain. TORY was not simply parading around COCHRAN's places of business for the purpose of

expressing his honest opinion about COCHRAN; rather, TORY practically admitted (and the trial court found) that he was picketing and protesting for the purpose of extorting money from COCHRAN. This is not a case simply about a successful defamation plaintiff; it is a case about a victim of multiple extortion attempts. Under these circumstances, the order that issued enjoining TORY from further extortion efforts (the "Injunction") was entirely appropriate and constitutional.

STATEMENT OF THE CASE

While generally accurate, Petitioners' "Statement of the Case" is factually erroneous in certain important respects, especially when coupled with the somewhat misleading language of Petitioners' articulation of the "Question Presented" by the Petition for Writ of Certiorari (the "Petition").[1]

First, contrary to the picture painted by Petitioners, this is not a case about restraining peaceful picketers; it is a case about extortion. The trial court (as the finder of fact) determined that Petitioners abused their speech rights by making "false" statements "maliciously and with reckless disregard for the truth ... for the purpose of inducing COCHRAN to pay TORY various amounts of money to which TORY was not entitled." (A21)[2]

[1] See Respondent's description of the "Question Presented" at p. i, above.

[2] Citations styled "A___" refer to the appendices to the Petition.

Second, Petitioners were doing much more than just expressing their opinions. In the course of their picketing activity, Petitioners made statements that (in the words of the trial judge) were "to the effect that COCHRAN owed a substantial amount of money to TORY ... that COCHRAN acted dishonestly or below the standard of care in prior legal representation of TORY; and that Cochran is a bad character and/or a substandard practitioner of law. These statements ... are untruthful, misleading and malicious." (A20-A21) While Petitioners may also have made non-actionable statements of opinion, it is misleading to suggest that this is a case about **only** speech that legitimately "criticized" or "questioned" COCHRAN. (P2)[3]

Third, the Injunction is not an order that "forever prohibits *all* future speech." (P2) The Injunction enjoins Petitioners from picketing and from making "statements about COCHRAN and/or COCHRAN's law firm" only in a "public forum" – i.e., "a place that is open to the public where information is freely exchanged." (*Damon v. Ocean Hills Journalism Club* (2000), 85 Cal.App.4th 468, 475).[4] (P2-P3) Settled case law uniformly holds that appropriate "time, manner and place" restrictions may constitutionally be imposed on speech. (*See, e.g., Hill v. Colorado*, 530 U.S.

[3] Citations to the Petition for Writ of Certiorari will be styled, "P___".

[4] Although it has been noted that a "public forum" includes places "historically associated with First Amendment activities, such as streets, sidewalks, and parks" (*Zhao v. Wong*, 48 Cal.App.4th 1114 (1996)), Petitioners' contention that a private conversation in a park or on a sidewalk would violate the Injunction, is absurd. In a "private conversation" one does not "freely exchange" information with members of the public. Accordingly, statements made privately, by definition cannot constitute speech in a "public forum".

703, 736 (2000); *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 535 (1980).) Under the facts of this case, the restriction at issue is necessary. The California Court of Appeal correctly upheld the Injunction, and there is no basis for certiorari to be granted with regard thereto.

REASONS FOR DENYING THE PETITION

CERTIORARI SHOULD BE DENIED BECAUSE FEDERAL AND STATE COURTS UNIFORMLY HOLD THAT TORTIOUS PICKETING AND RELATED SPEECH SUCH AS THAT HERE AT ISSUE MAY BE ENJOINED WITHOUT CREATING AN UNCONSTITUTIONAL "PRIOR RESTRAINT"

A petition for writ of certiorari will be granted only for compelling reasons, including resolution of conflicts between decisions of this Court and one or more lower courts of last resort. (*Rules of the Supreme Court of the United States,* Rule 10.) "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (*Id.*) The case law governing the present dispute is neither inconsistent nor unsettled. Rather, upon close inspection, Petitioner simply asserts that the California trial court and court of appeal misapplied the law. Review by this Court is neither appropriate nor warranted.

A. There Is No "Split" Between Circuits And/Or States For This Court To "Resolve"

In an effort to interest this Court in a mundane libel lawsuit, TORY argues that: (i) the California Court of Appeal "affirmed" the lower court's "prior restraint" order; and, (ii) in so doing, the California court joined other state and federal courts that have failed to abide by the general constitutional prohibition on prior restraint.

TORY's analysis is flawed, however. There are not two schools of thought on this issue. A uniform body of law safeguards First Amendment rights while, at the same time, protecting third parties from undue injury resulting from another's freedom of expression. Specifically, it is now firmly established that a party's freedom of expression may not be judicially abridged, unless and until it has been judicially determined – usually by a full trial on the merits – that the speech activity at issue is unlawful and unprotected.

This is the rule that was applied by the California Court of Appeal in this case, and it is the rule that has been consistently and uniformly applied to reach appropriate decisions in virtually every case cited by TORY in his Petition.[5] Accordingly, neither the lower court's decision in this matter, nor the cases cited by TORY in his Petition, evidence a "split between the circuits and the states on the constitutionality of prior restraint." There is

[5] While TORY may have cited one or more cases that were wrongly decided, or decided without adequate explanation of the court's rationale, an occasional erroneous or inadequate decision does not create a "split" in judicial thinking sufficient to justify certiorari by this Court.

no such "split" for this Court to resolve, and there is no reason to grant certiorari in this case.

1. Existing Case Law Is Consistent With The Principles Of Law Espoused By This Court In *Pittsburgh Press*

The theme of TORY's Petition is that the law is not being applied consistently because in some cases speech is enjoined, and in some cases it is not. He argues that the question of "constitutionality of prior restraints in defamation cases" is undecided. (P12) However, as evidenced by the very cases TORY cites, this is not true.

As TORY admits, there is a body of law that derives from this Court's "admonition" in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 375 (1973) that not all injunctions on speech are impermissible. Although *Pittsburgh Press* was not a defamation case, the constitutional question addressed was whether a judicial prohibition against a publication was an unconstitutional "prior restraint." A hearing was had, whereat evidence was "received" and argument was "heard ... from the parties and from other interested organizations" (*Id.* at 379). As a result, this Court was not "asked to speculate as to the effect of publication" but instead was in a position to make a "final determination that the actions of Pittsburgh Press were unprotected" **before** publication was prohibited (*Id.*). In this respect, the facts of *Pittsburgh Press* were distinguishable from those cases where injunctive relief was found to be unconstitutional.

The analysis set forth in TORY's Petition is defective because TORY fails to heed the lesson of *Pittsburgh Press*.

Rather than acknowledge the distinction between expression that has already been found to be unlawful and/or unduly intrusive on the rights of another party, TORY starts with the premise that whenever a court enjoins speech related activity, it has endorsed "prior restraint." While this may have once been an arguable position, it is no more. As explained in *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984), cases such as *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) "may once have stood for the proposition that any injunction against speech activity was a 'prior restraint' on speech." However, "[m]ore recently . . . the Supreme Court has stated that '[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.'" (*Advanced Training Systems, supra*, citing *Pittsburgh Press*.)

Based on this principle, the *Advanced Training Systems* court held that it is not unconstitutional to forbid a party to engage in speech that has **already been found** by a judge or jury to be unprotected. This exact same rationale was used in *Retail Credit Company v. Russell*, 234 Ga. 765, 779 (1975). There the court relied on *Pittsburgh Press* to find that an injunction directed at statements that a jury had already been found to be false and defamatory was not a "prior restraint." An injunction in *Guion v. Terra Mktg. of Nevada, Inc.*, 523 P.2d 847, 848 (Nev. 1974) similarly withstood constitutional scrutiny because it forbade defendant from making statements that were false and malicious and tended to discourage prospective customers from doing business with the plaintiff.

These orders were proper because "[e]quity will . . . restrain tortious acts where it is essential to preserve a business or property interest and also restrain the publication of false and defamatory words where it is the means or an incident of such tortious conduct." (*Id.*)

The court that decided *O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975), likewise acknowledged that:

> "[S]ome narrow classes of speech are unprotected by the First Amendment .... Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper. The judicial determination that specific speech is defamatory must be made prior to any restraint."

(*Id.* at 755, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).)

The *O'Brien* court held that if the plaintiff could prove that the statements at issue were false and defamatory, and that they were being made for the improper purpose of "blacklisting" plaintiff by attempting to "coerce the public into refusing to rent" from the plaintiff, then "a claim for proper injunctive relief might be granted." (*O'Brien* at 755.) The same conclusion was reached in the pre-*Pittsburgh Press* cases of *Carter v. Knapp Motor Co.*, 11 So. 2d 383 (Ala. 1943) and *Menard v. Houle*, 11 N.E.2d 436 (Mass. 1937) – both cases in which it was recognized

that a plaintiff's interest in his business and livelihood could outweigh a defendant's right to free expression.[6]

In *Lothschuetz v. Carpenter*, 898 F.2d 1200 (9th Cir. 1990), an injunction did not issue at the trial court level precisely **because** that court "characterized the injunction requested as an unwarranted prior restraint on freedom of speech." On appeal, two of the three justices reviewing the case took "a contrary view," and an injunction was therefore permitted to issue. Although the reported decision is devoid of any meaningful explanation of the basis for this "contrary view," there is no indication that the justices who voted to issue the injunction were rejecting established law, or condoning the wholesale use of prior restraint to prevent defamation. Instead, those judges – like the judges in the instant case – simply caused an order to issue that was designed to protect the plaintiffs from further damage to "business relations" and "personal reputation," while impacting the defendants' speech as little as possible.

---

[6] The *Carter* court commented: "[T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process. [Citation.] And the enjoyment of the good name and good will of a business is likewise a valuable property right subject to like protection. [Citation.] One's employment, trade or calling is likewise a property right, and the wrongful interference therewith is an actionable wrong." (*Carter, supra*, 11 So. 2d at 384.) Similarly, in *Menard* it was noted: "Equity will take jurisdiction where there is a continuing course of unjustified and wrongful attack upon the plaintiff motivated by actual malice, and causing damage to property rights as distinguished from 'injury to the personality affecting feelings, sensibility and honor.'" (*Menard, supra*, 11 N.E.2d at 437.)

2. *Pittsburgh Press* And The Cases That Follow It Are Consistent With Other Cases Decided By This And Other Courts

TORY argues that the foregoing decisions "contradict" this Court's opinions in *Near v. Minnesota*, 683 U.S. 697 (1931) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) as well as state and federal cases following the holdings of *Near* and *Keefe*. The court in *Retail Credit*, *supra*, addressed this very argument, however, and rejected it, distinguishing *Near*, *New York Times* and *Keefe* on the ground that the orders in those cases did not restrain expression that had already been determined to be unprotected, as was the case in *Retail Credit* (and as is the case here). In fact, in not one of those cases had a jury or other factfinder examined the words and conduct at issue in order to definitively determine whether or not it was tortious. Accordingly, pursuant to the rule of *Pittsburgh Press* – to wit, that "judicial determination that specific speech is defamatory must be made prior to any restraint" – the orders at issue were premature and potentially unwarranted. It was therefore appropriate and entirely consistent with the holding of *Pittsburgh Press* and its progeny (as well as those state and federal cases that pre-date *Pittsburgh Press* but come to the same conclusion) for this Court to reverse the lower courts in *Near, New York Times,* and *Keefe.*

Further, the numerous cases cited by TORY as support for his proposition that some courts refuse to enjoin defamatory speech, do nothing to establish the existence of the "split" TORY contends exists. In fact, the federal cases TORY cites further support COCHRAN in that they are all consistent with the rule that injunctions affecting speech generally should **not** issue before a fact-finder determines

that the speech related conduct is also tortious. None of those cases is inconsistent, however, with the cases on which COCHRAN relies for the proposition that **after** speech related activity has been found to be tortious, an injunction may issue.

TORY has located only a handful of state court opinions rendered during the last 106 years wherein an injunction issued without a full trial on the merits was upheld. Even if every one of those few cases was inconsistent with the general rule set forth herein, they would hardly constitute a significant "split" of authority and in fact could probably be written off as aberrations. Moreover, not all of these cases are contrary to COCHRAN's position herein. For example, in both *Schmoldt v. Oakley*, 390 P.2d 882 (Okla. 1964) and *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46 (Ill. 1948), the courts recognized that there is an exception to the general rule against enjoining libel, where "coercion" is involved. The fact finders in those cases, however, found that no coercion existed. In the case at bar, however, coercion was found at the trial court level, and may not be challenged here.

B. The Particular Injunction Here At Issue Comports With The Rules Created By The Case Law

After a full trial on the merits, the factfinder in this case determined that TORY abused his speech rights by attempting to extort money from COCHRAN, and by defaming COCHRAN in the process. (A15-A29) By TORY's own admission, if he is not enjoined from doing so, TORY will renew his extortionist activity until such time as COCHRAN pays TORY an undetermined amount of

money to stop it. (A8-A9) The Injunction, then, is a remedy which serves to prevent TORY from attempting to extort a payment from COCHRAN by publishing false statements – not merely a precaution to prevent further libel and slander.

Contrary to the description given by TORY, the Injunction does not "prohibit *all* future speech about COCHRAN." (P15) As explained in COCHRAN's "Statement of the Case," above, the injunction is not unlimited. It is designed to prevent TORY from resuming his obstructionist, harassing interference with COCHRAN's business. As the Court of Appeal recognized, TORY's conduct is much more than simple defamation. He has engaged in a pattern and practice of disrupting COCHRAN's ability to practice his profession for the purpose of obtaining money from COCHRAN. (A6-A8) Enjoining only specific statements or only defamatory speech will not remedy the wrong that TORY has committed and has vowed to continue committing unless prohibited from doing so by court order. (A8-A9)

Although the injunction here at issue is broad, in light of the unusual facts of this case, and the egregious nature of TORY's conduct, COCHRAN submits that it is not constitutionally overbroad.

CONCLUSION

Neither the Court of Appeal, nor the other courts referenced in TORY's Petition, have created a "split" among jurisdictions with regard to application of long-standing First Amendment principles. Application of those principles to the facts of this case can only result in the

conclusion that TORY's speech – which, by its wrongful nature, was not subject to constitutional protection – was properly enjoined. This Court should therefore deny the petition for a writ of certiorari.

Respectfully submitted,

JONATHAN B. COLE
Counsel of Record
KAREN K. COFFIN
SUSAN S. BAKER
NEMECEK & COLE
15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403
(818) 788-9500

July 2004